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Supreme Court of the United States

OCTOBER TERM 1937

No. 123

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,

Petitioner,

VS.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER.

No. 124

HARVEY S. ADAMS, RECEIVER, READING NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,

Petitioner,

VS.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered March 10, 1937 (R. 66-74) and is reported in 88 Fed. (2) 936. The opinion

of the United States District Court for the Eastern District of Pennsylvania, dismissing the original bills of complaint in these cases, was rendered May 1, 1935 (R. 20-22) and is not reported. The subsequent opinion of the United States District Court dismissing the amended bills of complaint was rendered June 25, 1935 (R. 24-25) and is not reported.

Jurisdiction

This Court has jurisdiction of these cases under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347).

History of the Cases

These suits were commenced in equity in the United States District Court for the Eastern District of Pennsylvania by certain stockholders of the Penn National Bank and Trust Company and the Reading National Bank and Trust Company, both of Reading, Pennsylvania (hereinafter referred to as the Penn National and Reading National). In each case the Comptroller of the Currency and the Receiver of the bank were the defendants. The relief sought in each suit was to enjoin the collection of 100% assessments levied by the Comptroller against the stockholders of these two banks, and to have said assessments declared illegal and invalid.

In each case the defendant Receivers moved to dismiss the bills of complaint (R. 16, 49) and the amended bills of complaint (R. 24, 54) and the Comptroller moved for other reasons to quash process and dismiss the bills of complaint as to him (R. 19, 51). Subsequently both motions were sustained, and the amended bills of complaint were dismissed by orders entered June 25, 1935 (R. 25, 55).

Appeals were subsequently taken and allowed (R. 29, 59). In view of the fact that the questions raised in the two cases were exactly similar, orders were entered below (R. 32, 61) consolidating them for purposes of appeal and permitting

the printing of a joint record; and for this reason both cases were made the subject of one petition in this Court for writs of certiorari.

The United States Circuit Court of Appeals for the Third Circuit reversed the United States District Court for the Eastern District of Pennsylvania by its orders entered March 10, 1937 (R. 74, 75), and denied petition for rehearing on April 19, 1937 (R. 76), whereupon the Receiver in each case petitioned this Court for writs of certiorari to review the orders of the Court below, which petition was granted on October 11, 1937 (R. 78).

Statement of Facts

Respondents herein, appellants below, are stockholders of the Penn National and Reading National banks, which banks had a capital of One Million Dollars ($1,000,000.00) and Six Hundred Thousand Dollars ($600,000.00) respectively, represented by One Hundred Thousand (100,000) shares and Sixty Thousand (60,000) shares of a par value of Ten Dollars ($10.00) per share (R. 3, 36).

For many years prior to 1933 these banks had conducted a banking business in the City of Reading, Pennsylvania. The banks were not permitted to reopen after the President's Proclamation of March 6, 1933, closing all banks, and subsequently the Comptroller found that it was necessary to take steps to conserve their assets for the benefit of their creditors, and thereupon placed them in conservatorship under the Bank Conservation Act of March 9, 1933 (R. 8, 40). Thereafter, having found that both banks were insolvent and unable to pay their debts, the Comptroller placed them in receivership (R. 9, 42).

Subsequently, on January 15, 1935, after a *valuation of their assets and after an accounting from the receiver of each bank* (R. 14, 47) the Comptroller officially found that 100% assessments were necessary to pay their debts; whereupon the Comptroller levied the assessments and

made demand upon the shareholders for payment of their stock assessment liability (R. 14, 47).

Notwithstanding the fact that admittedly as early as February 17, 1933, the banks were *"subjected to unusual withdrawals of deposits"* resulting in reserve deficiencies and placing them *"on the verge of insolvency"* (R. 5, 37—Par. 8); and notwithstanding the admitted official findings of the Comptroller as to insolvency of the banks and their inability to pay their debts, and his official determination that 100% assessments upon shareholders were necessary in order to pay creditors, certain stockholders in each bank brought these representative suits against the receivers and the Comptroller, seeking to enjoin the collection of the assessments, and thus to avoid payment of their statutory liability to creditors.

Your petitioner appears as the petitioning receiver in each of these cases, having been appointed originally as Receiver of the Reading National, and having succeeded William H. McGowan, resigned, as receiver of the Penn National.

Inasmuch as the facts upon which respondents base their alleged right to injunctions, and to avoid payment of their stock assessment liability, appear in the bills of complaint, and inasmuch as the legal principles applicable to these facts will test the correctness of the rulings of the Court below, it becomes necessary to analyze the bills of complaint which contain the following factual averments:

Prior to February 17, 1933, the Penn National and Reading National banks were *"subjected to unusual withdrawals of deposits,"* resulting in reserve deficiencies and placing them *"on the verge of insolvency"* (R. 5, 37—Par. 8). Because of this emergency, and *"in contemplation of a consolidation with Farmers National Bank"* (R. 4, 37—Par. 6), on that date the Penn National and the Reading National entered into an agreement with the Farmers National Bank and Trust Company of Reading (hereinafter referred to as the Farmers National) through their respective Boards of Directors. This agreement (R. 11, 44) provided for a

"merger" of the three banks under the name of the Farmers National *"subject to the approval of the Comptroller of the Currency and all other Governmental authorities whose consent will be required to comply with all legal requirements."*

The agreement further provided for an assumption by the Farmers National of the deposit and other existing liabilities of the Penn National and Reading National excepting liability to shareholders (R. 4, 37—Par. 6), and for the transfer of their assets by the Penn National and Reading National to the Farmers National.

It is further averred that these three banks entered into a supplemental agreement on February 20, 1933 (R. 13, 46) whereby the Penn National and Reading National guaranteed that their respective assets would exceed in value the deposit and other liabilities assumed by the Farmers National (R. 4, 37—Par. 7). The bills then aver that thereafter there followed a transfer of all the assets of the Penn National and the Reading National to the Farmers National, and a surrender of control, and that subsequently the Penn National and the Reading National ceased to transact their banking business and the business of all three banks was conducted by the Farmers National *"with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives"* (R. 5, 37—Par. 9).

It is further averred that the assets of the Penn National transferred to the Farmers National exceeded $6,500,000.00 in value, or $350,000.00 over and above the Penn National's liabilities, and had a fair market value of $5,400,000.00 (R. 5—Pars. 10, 12), and that the assets of the Reading National transferred to the Farmers National had a value in excess of the liabilities assumed by the Farmers National, which liabilities amounted to $9,000,000.00 (R. 38—Par. 10, 11); and that the assets of the Farmers National had a book value of approximately $9,500,000.00 and a fair market value of $8,000,000.00 (R. 23, 53).

It is then averred that the assets of the Penn National and Reading National were commingled with the assets of the Farmers National, which bank became liable to perform the agreements of February 17 and 20, 1933, and became liable to the Penn National and Reading National for the payment of all their deposit and other liabilities (except liabilities to stockholders) which amounted to $5,100,000.00 in the case of the Penn National and $9,000,000.00 in the case of the Reading National (R. 6, 39—Par. 13). The legal conclusion is that these alleged claims of the Penn National and the Reading National against the Farmers National constituted a trust fund for payment of creditors and that the assets transferred to the Farmers National were impressed with an equitable lien in their favor, and that such claims are *"more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities"* of the Penn National and Reading National *"without the necessity of any assessment upon the stockholders"* (R. 25, 53).

It is then averred that on March 18, 1933, the Acting Comptroller appointed a Conservator for the Farmers National, (R. 6, 39—Par. 15) who administered the assets of the three banks until October 10, 1933, when the Comptroller directed that the transfer of assets should be disregarded, re-allocated their assets among the three banks (R. 7, 40—Par. 17), and appointed conservators for the Penn National and Reading National; and that the Comptroller later proposed a plan of reorganization which contemplated a sale of certain of the banks' assets to a national bank newly to be organized, and a division of the proceeds of such sale among the three banks, which was subsequently done (R. 8, 41—Par. 19, 20).

It is then averred that the Conservator of the Penn National disregarded its claim against the Farmers National in the approximate amount of $5,100,000.00 and the Conservator of the Reading National disregarded its claim against the Farmers National in the approximate amount of $9,000,000.00 (R. 8, 41—Par. 21) and that subsequently the

Comptroller, Conservator and Receiver neglected and refused to collect these claims of the Penn National and Reading National against the Farmers National (R. 9, 42—Par. 25) which claims were the only resources available to the banks to pay their creditors; and that in arriving at the valuation of the assets and in determining insolvency these claims of the Penn National and Reading National against the Farmers National were disregarded and excluded (R. 10, 42—Par. 26).

It is further averred that on January 15, 1935, the Comptroller of the Currency made an assessment on the shareholders of the Penn National and Reading National *"upon a proper accounting by the Receiver"* and *"upon a valuation of the uncollected assets remaining in his hands"* (R. 9, 42—Par. 24) having found after such accounting and valuation that the assessment was necessary in order to pay the debts due from the Penn National and Reading National to their creditors (R. 15, 47); but that said assessment was illegal and invalid because the Comptroller acted upon an "unwarranted assumption of judicial power" (R. 10, 42—Par. 26) in waiving and canceling the claims of the Penn National and Reading National against the Farmers National.

The relief prayed is that the Comptroller's assessment against stockholders of the Penn National and Reading National be declared invalid, and that the enforcement thereof be enjoined.

Summed up, the only contention advanced by the averments of the bills of complaint in these cases is that although the Comptroller officially found that the banks were insolvent, and although after an accounting from the Receivers and a valuation of the assets in their hands, the Comptroller of the Currency found that the assets of the Penn National and Reading National were insufficient to pay the claims of their creditors and officially determined that 100% assessments on shareholders were necessary in order to pay such claims; nevertheless the stockholders say

that in arriving at this conclusion, which was within his official discretion to make, the Comptroller failed to give proper value to certain alleged claims of the Penn National and Reading National against the Farmers National, which claims, had they been properly evaluated and had they been pursued and enforced, would have made the assessments unnecessary.

Specifications of Errors

The United States Court of Appeals for the Third Circuit erred:

1. In reviewing the act of the Comptroller of the Currency, performed in the exercise of official judgment and discretion, determining that 100% assessments upon the stockholders of the Penn National and Reading National banks were necessary in order to pay the debts of those insolvent associations.

2. In reviewing the official determination by the Comptroller of the Currency that the Penn National and Reading National were insolvent and unable to pay their debts.

3. In holding that notwithstanding the determination by the Comptroller, arrived at in the exercise of official judgment and discretion after an accounting from the Receiver of each of these banks and a valuation of the assets, nevertheless the ensuing assessments were invalid.

4. In holding that the Comptroller of the Currency did not have the right: (a) to disregard the agreement of February 17, 1933; (b) to retransfer their assets to the Penn National and Reading National; and (c) to levy assessments upon shareholders of these associations, when he officially found that such action was necessary to pay their debts.

5. In holding in effect that the executory contract of February 17, 1933, and the transfer of assets of the Penn Na-

tional and Reading National to the Farmers National, and the resulting intermingling of the assets, created a merger or consolidation of the banks which the Comptroller could not set aside.

6. In permitting the stockholders to set up their judgment as to the value of the assets of the Penn National and Reading National, and their opinion as to the necessity for the assessments upon shareholders of these insolvent associations, against the official determination of the Comptroller to the contrary.

Questions Presented

1. Can the stockholders by these proceedings attack the official finding and determination of the Comptroller as to insolvency of the Penn National and Reading National banks, and the necessity for assessments on their shareholders, arrived at in the course of his official judgment and discretion after an accounting from the Receivers and a valuation of the banks' assets?

2. Did the Comptroller of the Currency have a right to disregard the attempted merger of the Penn National and Reading National with the Farmers National growing out of the agreement of February 17, 1933?

3. Did the transfer of assets of the Penn National and Reading National to the Farmers National, and their subsequent intermingling, resulting from the contract of February 17, 1933, create a legal merger or consolidation of the banks which the Comptroller of the Currency was bound to recognize?

4. Did the attempted merger of the Penn National and Reading National with the Farmers National, as a result of the contract of February 17, 1933, create any claims in favor of the first mentioned banks against the Farmers National which the Comptroller was bound to consider before levying the assessments on stockholders of these two insolvent associations?

SUMMARY OF ARGUMENT

I. Stockholders in National Banks Can Not Attack the Comptroller's Findings and Decisions Upon the Questions of Insolvency of the Bank, and the Necessity for and the Amount of the Assessment, His Decisions and Action in That Regard Being Final.

II. The Comptroller Was Not Bound by the Attempted "Merger" of the Three Banks Because

(A) No legal consolidation resulted from the contract of February 17, 1933.

(B) A "consolidation" and a "merger" are not the same; and the mere commingling of the assets of the three banks did not create a legal consolidation.

(C) The Contract was executory and the steps outlined therein to make it an executed contract were not completed; but even if a "merger" had resulted, still the Comptroller could levy assessments on the stockholders of the Penn National and the Reading National, if he found it necessary, and could collect such assessments through his receivers.

(D) The mere contracting by the Farmers National to assume the liabilities of the Penn National and Reading National did not relieve the last mentioned banks from their obligations unless and until the Farmers National actually performed by payment of the liabilities assumed.

III. The Sale of Assets by the Conservator to the Newly Organized National Bank, and the Distribution of the Proceeds of Such Sale, Was Valid and Proper.

IV. Respondents Are Guilty of Laches.

V. Speedy Action Is Necessary in Collecting the Assessment in Order That the Rights of Creditors May Be Protected.

VI. Conclusion.

ARGUMENT

I

Stockholders in National Banks Can Not Attack the Comptroller's Findings and Decisions Upon the Questions of Insolvency of the Bank, and the Necessity for and the amount of the Assessment, His Decisions and Action in that Regard Being Final.

The averments of the bills of complaint, as amended, when considered in their entirety, amount merely to stating that the assessments are invalid and illegal since, if the assets had been considered at their proper valuation, and if all claims and causes of action of the Penn National and Reading National had been first pursued and exhausted, there would have been no necessity for the levying and enforcement of the assessment. That this is the sole theory and basis relied upon by the respondents is made clear from such averments as that the Comptroller *"ignored and disregarded the claims"* of the Penn National and Reading National against the Farmers National (R. 8, 41—Par. 21); that the Comptroller, Conservator and Receiver of the Penn National and Reading National *"failed, neglected and refused to collect said claim * * * which was the only and ordinary resource * * * for payment of its creditors"* (R. 9, 42—Par. 25); that *"The alleged valuation of the remaining assets made by said defendant, J. F. T. O'Connor, Comptroller of the Currency, upon an alleged proper accounting, on which said assessment * * * was made, excluded as an asset"* the claims of the Penn National and Reading National against the Farmers National *"whereby the said assessment is invalid and illegal"* (R. 10, 42—Par. 26); and that the assets of the Penn National and Reading National, as commingled with the assets of the Farmers National, were subject to an equitable lien and constituted a trust fund in favor of creditors, which claim, in the case of each bank *"was then and now is more than*

*sufficient in the ordinary course of liquidation to pay and discharge all liabilities * * * without the necessity of any assessment upon the stockholders''* (R. 23, 54—Par. 14a).

Whether appearing as a defense to a suit at law in which the shareholder is a defendant, or whether asserted in a suit in equity in which the shareholders are plaintiffs, such averments as those contained in the bills of complaint are nothing more than an attempt to attack collaterally the Comptroller's finding and determination of insolvency and the necessity for the assessment. Such an attack can not be made and such defenses can not be asserted in a suit at law against a stockholder to enforce the assessment, or in direct proceedings such as these to enjoin enforcement of the assessment, which are nothing more than collateral attacks in the guise of direct attacks.

If the direct attack sets up nothing more than is forbidden to be set up in a collateral attack, such an attack is equally futile. *Trustees of Somerset Academy vs. Picher*, 90 Fed. (2) 741 (CCA 1), where the suit was in equity to enjoin collection of the assessment, but the Court held that even so disguised, it was merely a collateral attack not permitted by law. In that case the Ticonic National entered into a contract with the Peoples National whereby all depositors of the former would be paid in full and its liabilities assumed by the latter. The facts are almost identical with those in the instant cases. The Ticonic National went into liquidation and the Comptroller levied an assessment against its stockholders after an official determination of the necessity of such action to pay the bank's debts, which precipitated the suit, the stockholders contending that a note obligation of the Ticonic National was invalid, to satisfy which an assessment could not be made.

By an unbroken line of decisions this Court has established the unquestioned rule that the findings of the Comptroller and his resulting determination of the existence of insolvency, the necessity for an assessment and the amount thereof, are the equivalent of a judicial determination, which

is binding upon the bank, its stockholders and creditors, and which cannot be collaterally attacked. As early as 1869 this Court said in *Kennedy vs. Gibson*, 8 Wall, 498, at page 505:

> "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders can not controvert it. *It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him.*" (Italics ours.)

See also to the same effect:

Casey vs. Galli, 94 U. S. 673;
Germania National Bank vs. Case, 99 U. S. 628;
United States vs. Knox, 102 U. S. 422;
Bushnell vs. Leland, 164 U. S. 684;
McDonald vs. Thompson, 184 U. S. 71;
McClaine vs. Rankin, 197 U. S. 154;
Rankin vs. Barton, 199 U. S. 228;
Forrest vs. Jack, 294 U. S. 158.

The rule has been followed in a long line of decisions of United States Circuit Courts of Appeal other than the Third Circuit, illustrative of which are the following recent cases:

Collins vs. Caldwell, 29 Fed. (2) 329 (CCA 5);
Chase vs. Hall, 30 Fed. (2) 195 (CCA 9);
Crawford vs. Gamble, 57 Fed. (2) 15 (CCA 6);
Wannamaker vs. Edisto Bank, 62 Fed. (2) 696 (CCA 4);
Schram vs. Schwartz, 68 Fed. (2) 699 (CCA 2);
Emery & Co., vs. Wilkinson, 72 Fed. (2) 10 (CCA 10);
O'Connor vs. Watson, 81 Fed. (2) 833 (CCA 5);
Meeker vs. Baxter, 83 Fed. (2) 183 (CCA 2);
Silk vs. Ake, 83 Fed. (2) 618 (CCA 6);
Barbour vs. Thomas, 86 Fed. (2) 510 (CCA 6);
Dunn vs. O'Connor, 89 Fed. (2) 820 (App. D. C.).

Prior to the decision of the Court below in these cases the rule had been recently followed in the Third Circuit in the case of *Miller vs. Stock*, 65 Fed. (2) 773 where the Court followed the case of *Kennedy vs. Gibson*, supra, and refused to permit the stockholders to assert the defenses that the assets of the bank were sufficient to pay its debts, that the bank was solvent, and that the Comptroller had no sufficient evidence to justify the making of the assessment.

It should be noted that the case of Miller vs. Stock was made the basis of a strong dissenting opinion in the Court below; also that there is no difference between the theories advanced by the stockholders in that case and in these cases to avoid payment of their stock assessment liability.

These suits are in form direct attacks upon the findings of the Comptroller of the Currency as to the necessity for the assessment in order to pay the debts of these two national banks. The Court below in its opinion states as follows:

> "The real question is whether or not in making the assessment the Comptroller transcended the power and authority conferred upon him by Congress." (R. 66.)
>
> "The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading banks conveyed their assets to the Farmers Bank, in consideration for which the Farmers bank agreed to pay the obligations of the other two banks." (R. 68.)

Having stated the questions the Court proceeds to state that the Comptroller, in reaching his conclusions as to the necessity for the assessment "may not act arbitrarily, capriciously and in entire disregard of the provisions of the statute" (R. 69); and further

> "But no case has gone so far as to hold that the Comptroller may entirely disregard the statutory provision for winding up an insolvent bank and arbitrarily, and in violation of law, enforce the individual liability

of stockholders. But this is exactly what the Comptroller did in this case." (R. 70.)

"He thus, without authority and contrary to law tried to create a new situation upon which he determined the necessity of enforcing individual liability of stockholders." (R. 70.)

And the Court states further,

"The Comptroller exceeded his power and authority when he abrogated and set aside the contracts between the Farmers bank on the one side and the Penn bank and Reading bank on the other." (R. 71.)

With these findings and conclusions of the Court below, as stated in its opinion, it becomes necessary to examine the bills of complaint further, to determine upon just what averments these statements and conclusions are predicated. Such an examination will show the following vague inferences and legal conclusions. For instance, in Paragraph 19 of the bill (R. 8, 40) it is stated that the Comptroller of the Currency proposed a plan of reorganization which contemplated a sale and division of the proceeds *"which division was arbitrary."* Similarly in Paragraph 22 (R. 9, 41) it is stated that the Comptroller of the Currency acted *"beyond the powers conferred upon him under the National Bank Act or other statutory law,"* which conduct *"was an unlawful assumption of judicial powers neither delegated to him by statute nor capable of being delegated,"* which conduct violated the rights of the bank, its depositors, creditors and stockholders *"and deprived them of their property without due process of law."* In Paragraph 25 (R. 9, 42) it is stated that the Comptroller and Conservator cancelled the alleged claims of the Penn National and Reading National *"in fraud of the rights"* of the banks and depositors, creditors and stockolders. Also, in Paragraph 26 (R. 10, 42) it is stated that the Comptroller in valuing the assets excluded the claims of the banks against the Farmers National, and thus committed *"a grave error of law based*

upon his unwarranted assumption of judicial power in abrogating, canceling and waiving" said claims, "whereby the assessments became invalid and illegal." These are the only averments that approach an attempt to plead such fraudulent or arbitrary conduct as can be made the basis for a direct attack on the Comptroller's decisions.

What constitutes averments of fraud sufficient to justify relief if proven, is thoroughly discussed in Meeker vs. Baxter, 83 Fed. (2) 183-186 (C. C. A. 2):

> "It has indeed been said that it may be impeached for 'fraud' or 'illegality'; and while it is not very clear just what these words mean, we may assume arguendo that if the Comptroller were consciously to assess shareholders in sums which he did not believe to be true, they could show it and escape; perhaps the same may be true if he proceeded in the face of a statute. But his assessment cannot be attacked by showing that the debts were in fact smaller or the assets larger than he took them to be, or that the directors had misconducted themselves or acted without the knowledge of the shareholders, or defrauded them. Fraud must at least mean fraud of the Comptroller in making the assessment, and the defense does not so allege. Nor was a forced subscription from the directors a liquidation. The second and third defenses were as bad; the second amounted to no more than *that the Comptroller did not take all the bank's property into his computation.* It was not enough to add that the assessment was "made in bad faith and is fraudulent, illegal and void"; such charges must be explicit. *If the defendants really meant to say that the Comptroller omitted the mortgage from his computation of the assets, knowing that the transfer was fraudulent and that the property should have been included, they were obliged to say so in detail.* Chamberlain Machine Works vs. United States 270 U. S. 347, 46 S. Ct. 225, 70 L. Ed. 619. They would probably not dare to make such a charge; if they have the hardihood to do so, it must be with circumstance and upon their own oaths, so that they may be accountable for what they say. The third defense comes to no more than that there were no creditors of

> the bank; it has not a semblance of validity as a defense. Thus as a bill for discovery the counterclaims were invalid on their face, because the defenses to which they were ancillary were demurrable." (Italics ours.)

In other words general charges of improper conduct by an officer are insufficient unless they refer to transactions in their nature wrongful or fraudulent. As was said in *Wannamaker vs. Edisto National Bank,* 62 Fed. (2) 696 (CCA 4), at page 699:

> "In addition to specific allegations of fact, the bill of complaint abounds in charges of a fraudulent scheme and design on the part of the Edisto Bank, in general terms, but they are mere conclusions of the pleader, and no facts are stated from which fraud or conspiracy can be legitimately inferred. General charges of this sort are not sufficient, unless the transactions to which they refer are such as in their essential nature to constitute a fraud."

A motion to dismiss does not admit conclusions of law and of fact and other matters not properly pleaded. See:

Chamberlain Machine Works vs. United States, 270 U. S. 347;
Fogg vs. Blair, 139 U. S. 118;
Amick vs. The Mortgage Corp., 30 Fed. (2) 359.

Petitioner concedes that if the Comptroller had acted arbitrarily or fraudulently in the performance of his duties in finding insolvency of these banks and the necessity for an assessment, the stockholders might attack such action by a bill in equity brought against the Receiver for that purpose. But it is not even stated in the bills that the Comptroller was not fully acquainted with the affairs of the bank at the time he appointed the Conservator and the Receivers, and made his findings and order for assessment. It is our contention that no such arbitrary action is shown (fraud is not urged in the bills nor found by the court below) and

that the averments contained in the bills of complaint would not support conclusions and findings to that effect.

There have been instances prior to these cases where the stockholders have attempted in similar proceedings to enjoin the Comptroller from levying the assessment, illustrative of which are the following:

In *Washington National Bank of Tacoma vs. Eckels*, 57 Fed. 870 an attempt was made by a bill in equity to restrain the Comptroller from appointing a Receiver for a bank in liquidation, but the Court held that the decisions of the Comptroller as to the insolvency of the bank, based upon his investigation of the facts, were to be taken as final.

In *Liberty Bank vs. McIntosh*, 16 Fed. (2) 906 (CCA 4) an attempt was made by a bill in equity to enjoin the collection by the Receiver of a failed bank of a stock assessment. The bill averred that the bank had gone into voluntary liquidation and that the indebtedness found by the Comptroller as a basis for the assessment was incorrect. The Court held that the decisions of the Comptroller relating to the liquidation of national banks were not subject to an attack of this kind.

In *Wannamaker vs. Edisto National Bank*, 62 Fed. (2) 696 (CCA 4), a suit was brought in equity by certain stockholders against the Receiver of the bank to enjoin the enforcement of stock assessment liability. The Court refused to permit the injunction, holding that all the averments of the bill with reference to the conduct of the Comptroller in making his decision as to insolvency and the necessity for the assessment were merely conclusions and were not sufficient basis for the injunction.

A very recent case in this connection is that of *United States Savings Bank vs. Morgenthau*, 85 Fed. (2) 811 (App. D. C.), cer. denied 299 U. S. 605. In that case suits were brought against the Secretary of the Treasury and the Comptroller to vacate the receivership of the United States Savings Bank, Washington, D. C. The United States Court of Appeals for the District of Columbia said, page 814:

"In the present case the Comptroller determined that the Bank was insolvent and appointed a receiver as aforesaid under the statute to wind up its affairs. *The question of solvency or insolvency of the Bank depends upon the estimate of appraisal of the value of its securities.* This is a matter of judgment and discretion."

"*It is plain that the difference between the respective parties regarding the solvency or insolvency of the Bank rests upon an estimate of the value of the securities held and properly owned by the Bank during this period.* The Comptroller determined that the Bank was yet insolvent, whereas the president of the Bank contends that it had regained its solvency. This mere contradiction, standing alone, compels the court to accept the official determination of the Comptroller. It has been held by a long array of authorities that, where the Comptroller of the Currency has held a bank to be insolvent and has appointed a receiver for it, the court will not substitute its judgment for the judgment of the Comptroller, unless it appears by convincing proof that the Comptroller's action is plainly arbitrary, and made in bad faith."

"*In the present case no facts are averred which tend to show that the action of the Comptroller was arbitrary, or made in bad faith. The controversy related simply to the estimate entertained by the Comptroller concerning the value of the securities belonging to the Bank. The presumption of correctness attending such a determination cannot be overcome by the mere assertion that it was 'arbitrary, wanton, and malicious.' It is true that the motion sustained by the lower court for a dismissal of the plaintiffs' bill concedes the truth of all facts which are properly pleaded in the bill itself. But in this case no facts are pleaded except a difference in appraisal of the assets of the Bank made by the respective parties,* and these are not sufficient to overcome the presumption which the law attaches to the official determination reported by the Comptroller of the Currency in the exercise of his official duties."

Cases to the same effect are:

Davis Trust Company vs. Hardee, 85 Fed. (2) 571 (App. D. C.);

Acker vs. Hamilton, 85 Fed. (2) 574 (App. D. C.);
United States National Bank of LaGrande vs. Pole, 2 Fed. Sup. 153;
Wilson vs. Awalt, 2 Fed. Supp. 465.

It is our contention that the entire theory advanced by the averments of the bills of complaint, when given their greatest weight, constitute admissions of ownership of the stock, of a finding of insolvency and the existence of the assessment after an official determination by the Comptroller of its necessity to pay the banks' debts; and that after pleading many facts why the Comptroller of the Currency and his subordinates should have followed a different course in administering the affairs of the banks, and should have pursued the alleged causes of action of the Penn National and Reading National against the Farmers National before calling on the stockholders, respondents arrive at the conclusion that if this had been done there would have been no necessity for the assessment. Thus, the bills of complaint resolve themselves into a mere collateral attack, in the guise of a direct attack, upon the official action of the Comptroller in finding that the banks were insolvent and in appointing a Conservator and Receivers and in levying the assessment against the stockholders, which attack is not permitted.

II

The Comptroller Was Not Bound by the Attempted "Merger" of the Three Banks Because

(A) No legal consolidation resulted from the contract of February 17, 1933.

In its opinion the Court below said (R. 68):

> *"The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading Banks conveyed their assets to the Farmers Bank,* in consideration for which the Farmers Bank agreed to pay the obligations of the other two banks." (Italics ours.)

It becomes important, therefore, to determine whether the Comptroller had a legal right to disregard the contract of attempted merger, and to direct the Conservator to restore the assets to the Penn National and Reading National after the transfer to the Farmers National, and to place those banks in conservatorship, and receivership, and as a part of their liquidation, subsequently to levy the assessments. It should be noted that it is nowhere averred that the re-allocation of the assets among the three banks was wrongful or unfair or resulted in an unfair advantage of one bank over another, but merely that the Conservator "*arbitrarily re-constructed the assets and liabilities of each of said banks as of April 24, 1933, made an arbitrary division thereof among each of said banks, etc.*" (R. 8, 41—Par. 20); nor is the claim anywhere made that one bank took possession of assets in an amount greater or less than that to which it was entitled, or that any depreciation in value of the assets resulted; nor was it averred that the assets of one bank were allocated to another.

The bills of complaint aver (R. 4, 36—Par. 6) and the agreement itself shows (R. 13, 46) that the banks alone were parties to the contract of February 17, 1933, and that neither the Comptroller nor any subordinate or agent of his, were parties signatory or otherwise to that contract, nor is it anywhere averred that said contract was entered into by the banks with his direction, knowledge or consent. It is solely upon this contract that the opinion of the Court below is based.

The National Bank Act (U. S. C. Sec. 33, Title 12) (App. 44), sets forth the method whereby two or more national banking associations may consolidate. The mandatory requirements for a completed, legal and valid consolidation are:

1. An agreement upon terms of consolidation by a majority of the Board of Directors of each association proposing to consolidate.

2. Ratification of such terms of consolidation by the affirmative votes of two-thirds of the stockholders of each association.

3. Publication of stockholders' meeting.

4. Sending notice to each shareholder by mail.

5. Approval of the Comptroller of the Currency.

Unless these steps outlined by the statute as necessary for a consolidation are taken, and unless the statutory requirements are met including the approval of the Comptroller, no legal consolidation results. See:

Casey v. *Galli*, 94 U. S. 673.
Keyser v. *Hitz*, 133 U. S. 138.
McCormick v. *Market National Bank*, 165 U. S. 538.
Hightower v. *American National Bank*, 263 U. S. 351.
Ex parte Worcester County National Bank, 279 U. S. 347.
Benedict v. *Anderson* (C. C. A. 6), 70 Fed. (2d) 227.
Hiatt v. *Peddy* (C. C. A. 5), 73 Fed. (2d) 235.
Houston v. *Drake*, 18 Fed. Sup. 693.
Warren v. *Boston National Bank*, 252 Mass. 523.

The bills of complaint do not disclose, and counsel for respondents have not contended, that these mandatory requirements of the statute were met. Obviously the bills of complaint are defective and properly subject to a motion to dismiss, if on their face they fail to show a legal consolidation.

It follows that if a legal consolidation was not accomplished, the Comptroller had the right to restore the respective banks to their original status in so far as possible, which was done as of April 24, 1933. After Conservators had been appointed, it was no longer possible for the banks, as corporations, to take any action to accomplish legal consolidation, because conservatorship had placed them under the jurisdiction of the Comptroller. See:

Oppenheimer v. *Harriman National Bank*, 85 Fed. (2d) 582 (C. C. A. 2); 301 U. S. 206.

Hardee v. *Washington Loan & Trust Co.* (App. D. C.), 91 Fed. (2d) 314.
Ross v. *Long* (Ia. 1934), 258 N. W. 94.
In re Hobbs estate (Pa. 1935), 180 A. 140.

It then devolved upon the Comptroller, as the officer charged by law with the administration and supervision of these banks, to take the necessary steps, through the conservators, to restore the banks to their former status by declaring that the attempted consolidation had failed of completion, and to return the assets of the respective banks to their conservators to be held in their behalf for further administration.

The whole structure of the bills of complaint, and the opinion of the Court below are founded upon the major factor of a completed and legal consolidation of these banks. The grievances of the stockholders outlined in the bills of complaint, and the criticisms contained in the opinion of the Court below are predicated upon a valid consolidation or a binding agreement to consolidate. Remove the foundation and the superstructure must fall, and the bills of complaint as a whole must be subject to dismissal.

(B) A "Consolidation" and a "Merger" Are Not the Same; and the Mere Commingling of the Assets of the Three Banks Did Not Create a Legal Consolidation.

A *"merger"* and a *"consolidation"* are often confused, but legally they are not the same, the chief difference being that a consolidation works a dissolution of the corporations consolidating, while a merger does not.

> "That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."
>
> *Railroad Company* v. *Georgia*, 98 U. S. 359-363.

"The results of a merger are entirely different from those of a consolidation. Ordinarily, when corporations of two or more states 'consolidate' in the technical sense of the term, the old corporations are dissolved and a new corporation comes into being in each state * * *. However, when two corporations unite by way of merger, the result is not the same as in case of consolidation. In the case of merger the one is absorbed by the other, and when we come to apply the true test as to whether, under a given statement of facts, there has been a merger, it becomes necessary to ascertain whether the existence of one of the corporations, as such, has been preserved, and the other has ceased to exist."

Lee v. *Atlantic Coast Line*, 150 Fed. 775-787.

See also:

Walsey v. *Chicago, etc. R. R. Co.*, 147 Fed. 608.
Royal Palm Soap Co. v. *Seaboard Air Line* (C. C. A., Fla.), 296 Fed. 448.
Central University v. *Walters*, 122 Ky. 65, 90 S. W. 1066.
Vicksburg Tel. Co. v. *Citizen Tel. Co.*, 79 Miss. 341, 30 So. 725.
Ramsey v. *Hicks*, 44 Ind. 490; 87 N. E. 1091.
State v. *At. Coast Line R. R.*, 202 Ala. 558, 81 So. 60.
Collins N. Bk. v. *Essau*, 74 Okl. 45, 176 Pac. 514.
Indemnity Co. v. *R. R. Commissioner*, 187 Wis. 528, 205 N. W. 492.

While undoubtedly a legal consolidation of these banks in the manner prescribed by the statute, and consented to by the Comptroller, would have bound him in administering these banks, nevertheless a mere intermingling of their assets by two or more national banks would not affect a consolidation which the Comptroller could not ignore and set aside.

In *Fuller* v. *City National Bank of Huron*, 52 Fed. (2d) 865, affirmed 52 Fed. (2d) 870 (C. C. A. 8), there was involved a sale of the assets of the City National to the First

National, and the resulting transactions were identical with those under consideration here.

> "The physical assets of the City National were moved to the banking house of the First National, and its assets and liabilities entered upon the books of the said First National." Pg. 871.

A Receiver was appointed for the City National and

> "there was a finding by the Comptroller of the Currency that said bank was insolvent." Pg. 872.
>
> "The Comptroller of the Currency *never consented to the consolidation of the City National and the First National banks, and the statutory requirements for consolidation of national banks* have never been complied with." Pg. 872.

The trial Court found that the assets of the two banks were wrongfully intermingled, but that such inter-mingling did not create a consolidation, and said at page 867:

> "It constituted a wrongful scrambling of the assets of the two corporations without authority and without relieving the stockholders of either corporation of their respective liabilities as such * * *."

The Court of Appeals for the Eighth Circuit affirmed the decree of the trial Court in this regard.

Many cases can be cited where, on basically the same facts as those herein involved, viz.: a transfer of assets from one bank to another, an assumption of liabilities, an intermingling of the assets, and a subsequent levying of an assessment against stockholders of the transferring bank by the Comptroller, the assessment was upheld.

Wyman v. *Wallace*, 201 U. S. 230.
Hightower v. *American National Bank*, 263 U. S. 351.
Brown v. *O'Keefe*, 300 U. S. 598.
Washington National Bank v. *Eckels*, 57 Fed. 870.
Liberty Bank v. *McIntosh* (C. C. A. 4), 16 Fed. (2d) 906.

American National Bank v. *Commercial National Bank*, 276 Fed. 371; 254 Fed. 249; 248 Fed. 187 (C. C. A. 5).
King v. *Pomeroy*, 121 Fed. 287 (C. C. A. 8).
George v. *Wallace*, 135 Fed. 286 (C. C. A. 8).
Harris v. *Briggs*, 264 Fed. 726 (C. C. A. 8).
Chase v. *Hall*, 30 Fed. (2d) 195 (C. C. A. 9).
Derschied v. *Andrew*, 34 Fed. (2d) 884 (C. C. A. 8).
Crawford v. *Gamble*, 57 Fed. (2d) 15 (C. C. A. 6).
Wannamaker v. *Edisto Bank*, 62 Fed. (2d) 696 (C. C. A. 4).
Richter v. *Laredo National Bank*, 62 Fed. (2d) 289 (C. C. A. 5).
Erhard v. *Boone State Bank*, 65 Fed. (2d) 48 (C. C. A. 8).
B. V. Emery Co. v. *Wilkinson*, 72 Fed. (2d) 10 (C. C. A. 10).
Hays v. *Wilkinson*, 72 Fed. (2d) 201 (C. C. A. 10).
Stevens v. *Hamilton*, 81 Fed. (2d) 324 (C. C. A. 7).
O'Connor v. *Watson*, 81 Fed. (2d) 833 (C. C. A. 5) Cer. den. 298 U. S. 657.
Trustees of Somerset Academy v. *Picher*, 90 Fed. (2d) 741 (C. C. A. 1).
U. S. National Bank v. *Pole*, 2 Fed. Sup. 153.
Houston v. *Drake*, 18 Fed. Sup. 693.
Wegman v. *Hulse*, 27 Fed. (2d) 187 (D. C. N. Y.).
Holland Banking Co. v. *Continental National Bank*, 43 Fed. (2d) 640 (D. C. Mo.).

In these cases the mere transferring of assets from one bank to another under a contract calling for an assumption of liabilities, the commingling of assets resulting therefrom, and the cessation of business by the transferring bank, did not estop or prohibit the Comptroller from levying and collecting a stock assessment from the stockholders of the transferring bank.

(C) The Contract Was Executory and the Steps Outlined Therein to Make It An Executed Contract Were Not Completed; but Even if a "Merger" Had Resulted, Still the Comptroller Could Levy Assessments on the Stockholders of the Penn National and the Reading National, if He Found it Necessary, and Could Collect Such Assessment Through His Receivers.

The contract (R. 11, 44) *shows on its face that it was at most executory.* The three banks *agreed to merge* and committees of each bank were to be appointed to act with certain accountants to evaluate the assets, which evaluation was to be submitted to the Board of Directors of each bank for approval. Further, the accountants were to submit a plan based on said valuation, and appropriate legal action "to effect a recapitalization" of each bank was to be taken. The stockholders of each bank were to receive a proportionate share of stock of the Farmers National, but liability for assessment was specifically reserved; and finally, all was made subject to approval by the Comptroller and other Governmental authorities.

Nowhere in the bills of complaint is it averred that any of these things was done. It is not shown that the approval of the Comptroller was ever received, or that the plan was worked out or followed, as provided by the agreement of February 17, 1933.

So that in any event the Comptroller did not *"abrogate or set aside"* any contract rights of the contracting parties, as assumed by the Court below. He merely acted on the situation as he found it (no executed contract) and determined the rights of the respective banks in so far as the contract had been executed, and returned the assets to their respective representatives.

But even though a completed "merger" had been effected, with the Penn National and the Reading National going into liquidation, nevertheless the Comptroller could have levied the assessments as he did, and through his Re-

ceivers could have enforced them. The mere liquidation of a bank, and the consent of the Comptroller to it, have no effect on his right to levy and enforce the assessment liability of stockholders, if he officially finds that action to be necessary to pay the debts of the liquidating bank.

Washington National Bank v. *Eckels, supra.*
Liberty National Bank v. *McIntosh, supra.*
Wegman v. Hulse, supra.
Stevens v. *Hamilton, supra.*
O'Connor v. *Watson, supra.*
Trustees of Somerset Academy v. *Picher, supra.*

(D) The Mere Contracting by the Farmers National to Assume the Liabilities of the Penn National and Reading National Did Not Relieve the Last Mentioned Banks from Their Obligations Unless and Until the Farmers National Actually Performed by Payment of the Liabilities Assumed.

The fallacy of the position taken by the respondents and by the Court below seems to lie in their failure to recognize two things:

(1) The mere agreement of the Farmers National to assume the liabilities of the Penn National and Reading National did not relieve the last mentioned banks of their obligations until the Farmers National paid the deposit and other liabilities assumed under the contract, or unless the depositors of the Penn National and Reading National accepted the Farmers National as their new debtor, with a new consideration therefor flowing to them. The bills of complaint aver no facts upon which a novation could be predicated, or which would indicate that the depositors had relieved the Penn National and Reading National of their obligations. The contracts themselves specifically reserved assessment liability of stockholders of the two transferring banks for the benefit of creditors ((R. 13, 45).

Whatever contracts the officers and directors of the banks might make looking to a merger of the banks could not af-

fect the existing right of the creditors to have their debts paid by the Penn National and Reading National, with which banks they originally contracted, and they could not be required to recognize or accept the Farmers National as their debtor without their consent express or implied. Hence the claims of the creditors of those banks, until actually paid, were valid and subsisting, and the mere agreement of the Farmers National to assume the liabilities of the Penn National and Reading National did not strip the last mentioned banks of their liabilities to creditors nor did the denuding of the transferring banks of their physical assets compel the creditors to accept rights of action under the contract against the Farmers National.

The cases and texts fix the general law regarding the necessary elements of a novation which are (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; (4) the validity of the new contract. See:

In re Straub, 158 Fed. 375.
In re Ransford, 194 Fed. 658.
Case Threshing Machine Co. v. *Road District*, 210 Fed. 366.
In re Schwab, 258 Fed. 772.
Dickinson v. *Speedway Co.*, 294 Fed. 693.

There can be no question as to the existence of element (1) and element (4) can be admitted for purposes of argument; but elements (2) and (3) are wholly lacking. Nowhere are any facts averred indicating that the depositors and creditors of the Penn National and Reading National intended to discharge those banks from their debts and to accept the Farmers National as their debtor, or that all the claims were filed against the Farmers National and none against the Penn National and Reading National. All that is shown is that the Farmers National "*carried on and conducted its regular banking business*" (R. 3, 39, Par. 14).

Courts will take judicial notice of published reports of the Comptroller of the Currency, Federal Reserve Bulle-

tins, and other official publications dealing with banks and banking, and this Court has so held in *Texas and Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245-254. It is of assistance in this connection to note from the 74th Annual Report of the Comptroller of the Currency to Congress (1936), pages 360 to 363, inclusive, that claims in large amounts have been filed against all three banks, showing conclusively that the creditors did not release the Penn National and Reading National, or accept the Farmers National as their debtor; and to note further that on those claims the banks have paid only 55 per cent in the case of the Farmers National, 40 per cent in the case of the Penn National, and 25 per cent in the case of the Reading National, which shows conclusively that the full amount of the assessments levied is necessary to pay creditors the amounts of their claims. Even though the creditors of the Penn National and Reading National had filed claims against the Farmers National, that would not estop them from still filing claims against the first mentioned banks also (*City National Bank of Huron* v. *Fuller, supra*); since any estoppel against them could operate only as to any deposits they made in the Farmers National between February 17 and March 6, 1933, which facts are not set up in the bills of complaint. *Thompson* v. *Park Savings Bank*, 77 Fed. (2) 955 (App. D. C.) cer. denied, 296 U. S. 592.

The burden was on respondents to aver and prove facts sufficient to constitute a novation, since it will not be presumed.

> "There is no question here as to the previous valid obligation or the validity of the new. The doubtful question is whether plaintiff intended to discharge the City National from its debt and accept the First National as its debtor. It is a settled proposition that novation is not presumed, and that the burden is on the party alleging and relying thereon to clearly prove it. Intention of the parties is the controlling element." *City National Bank of Huron* v. *Fuller*, 52 Fed. (2) 870 at pg. 874.

The mere assumption of a debt by a third party is not sufficient to constitute a novation, and the creditor may elect to assent, or to ignore the contract and enforce all his rights against the original debtor.

City National Bank of Huron v. *Fuller, supra.*
Steinfeld & Co. v. *Wing Wong,* 14 Ariz. 336, 128 P. 354.
Leckie v. *Bennett, et al.,* 160 Mo. App. 145, 141 S. W. 706;
Copeland v. *Beard,* 217 Ala. 216, 115 So. 389.

(2) The real consideration contemplated by the merger contract was not the mere assumption of the liabilities of the Penn National and Reading National by the Farmers National, but rather was the *assumption and payment* of such liabilities. The contract specifically reserved rights of action against the stockholders. In the absence of novation and until the Farmers National had performed its part of the contract by paying the claims of the creditors of the Penn National and Reading National, and had discharged those liabilities, the Farmers National could not maintain an action against either the Penn National or the Reading National on the supplemental contract of guaranty or on any liability that might be created between the banks. See:

Treadwell v. *Fagan,* 68 Fed. (2) 550, (C. C. A. 5)
Aberly v. *Craven County,* 70 Fed. (2) 52, (C. C. A. 4)

To assume a debt carries with it the undertaking of the performance of the obligations, and where a simple debt is involved the assumption carries with it an agreement to pay. See cases cited 5 C. J. 1375, note 5a.

It is our contention that the theory and construction of the contract and of the rights and liabilities of the parties, as adopted by the trial Court, entirely ignores the principles of assumption and novation.

III.

The Sale of Assets by the Conservator to the Newly Organized National Bank, and the Distribution of the Proceeds of Such Sale, Was Valid and Proper.

Averments are made in the bills of complaint (R. 8, 40—Pars. 19 and 20) that the Comptroller of the Currency proposed a plan of reorganization for these three banks which contemplated the organization of a new national bank and a sale of assets to it, and a division of the proceeds of the sale among the creditors of the respective banks. It is further stated therein that this division was arbitrary inasmuch as it was based on a classification adopted from the report of national bank examiners and not on the basis of the financial condition of the banks as of February 17, 1933, the date of execution of the contract. It is not stated, however, that the basis adopted was wrong or improper, or that the bank examiner's reports incorrectly reflected the assets of the bank, or that the division made resulted in a loss or unfair gain to any of the three banks, or that the assets of one bank were allocated to another, or that the Comptroller was not advised as to the banks' conditions at the time the plan of reorganization, and the disposition of the proceeds of the sale were made. Nor is it anywhere shown that the stockholders have suffered from or have been prejudiced by the method used by the Comptroller.

This procedure is not unusual and the plan under which the sale was made has been resorted to by the Comptroller for many years for the purpose of relieving similar situations. Several hundred banks have been rehabilitated in this way. Further, the Courts have approved such sales. For instance, in *Gockstetter* v. *Williams,* 9 Fed. (2) 354 (C. C. A. 9), a sale by the Receiver of all the assets of the bank was held to be valid and it would logically follow that a sale of a portion of the assets would likewise be valid if made for a proper purpose. In the case of *City National*

Bank v. *Fuller,* 52 Fed. (2) 870 (C. C. A. 8), the Court approved a similar sale and said at page 873:

> "It has become something of a custom for national banks to take over other banks in failing circumstances and this has received the approval of the Comptroller of the Currency. If the transaction is a fair one it is in the public interest. . . . We desire to make clear our position that the transaction between the banks was, in our judgment, a legal one."

In the case of *Barbour* v. *Thomas,* 7 Fed. Sup. 271, 86 Fed. (2) 510 (C. C. A. 6) cert. den. 300 U. S. 670, the stockholders attacked a sale made by the First National Bank—Detroit, and the Guardian National Bank of Commerce to the newly organized National Bank of Detroit involving assets aggregating approximately $150,000,000.00. The Court upheld the sale and decided that the stockholders could not challenge the wisdom of the sale in a suit to enforce the assessment.

In *Davis Trust Company* v. *Hardee,* 85 Fed. (2) 571, (App. D. C.) stockholders of the Federal-American National Bank and Trust Company brought a suit against the Receiver of the bank seeking to enjoin the collection of an assessment levied against them by the Comptroller of the Currency. Among the grounds set forth as a basis for relief from assessment liability was that a sale of the bank's assets made by the Conservator to the newly organized Hamilton National Bank, at the direction of the Comptroller, was unfair to stockholders because the sale did not take into consideration the possibility of a future enhancement in the value of the assets. The trial Court declined to enjoin the collection of the assessment and the Court of Appeals affirmed that decision.

It should be noted that the bills of complaint do not aver that full value was not received for the assets or that the sale was fraudulent. They merely state that the division of the proceeds of the sale among the three banks was arbi-

trary and on a basis not now satisfactory to the stockholders.

We respectfully urge upon this point that the sale made by the Conservators was proper and should not be permitted to be attacked by such evasive and general language as is contained in the bills of complaint.

IV.

Respondents Are Guilty of Laches.

The respondents complain of the fact that the Comptroller proposed a plan of reorganization of these three banks which involved a sale of their assets by the Conservators of the bank to a newly organized national bank. They also complain about the division of the proceeds of the sale among the three banks, and of the fact that the Conservator, acting under instructions from the Comptroller, reallocated the assets among the banks without attributing proper value to the claims of the Penn National and Reading National against the Farmers National, and thus abrogated the effect of the agreement of February 17, 1933.

All of these things are said to have been done in October, 1933. If the stockholders objected to the sale of assets by the Conservator, and the re-allocation of the assets among the banks, they should have made their objections known and demanded that action be taken for their protection, and should not have awaited the levying of the assessments before taking action in February 1935 when these suits were filed.

In the case of *Bailey* v. *Tillinghast*, 99 Fed. 801 (C. C. A. 6), stockholders sought to avoid payment of the assessment by setting up illegalities and fraudulent practices in the organization and management of the bank. In discussing this defense the Court said at page 808:

> "It is not meant to say that irregularities may not occur so gross as to authorize the stockholder to intervene, and apply to the proper tribunals for correction;

> but in that case the proceeding must be promptly taken, and not delayed until the rights of others have become involved in business entered upon with the presumption that the ground is clear, or that, if irregularities have occurred, they have been condoned."

In *Benedict* v. *Anderson,* 70 Fed. (2d) 227 (C. C. A. 6) the stockholders attempted to avoid payment of their assessment on the ground that the stock was obtained as a result of the declaration of a stock dividend. The Court refused to allow this defense, stating on page 229:

> "He never undertook in an action against the bank or the comptroller to rescind the issuance to him of any of the dividend stock. The court found upon substantial evidence that the bank publicly advertised in the newspapers and other publications, on bill-boards, in the street cars, and upon its windows and in the financial statements placed upon its counters, that its stock was increased as above indicated."

In the case of *Barbour* v. *Thomas,* 86 Fed. (2d) 510 (C. C. A. 6) cer. den. 300 U. S. 670, the sale by the Conservators of the Detroit banks was attacked by the stockholders as a ground for avoiding payment of the assessment. The District Court in its opinion (7 Fed. Sup. 271) said at page 276:

> "Neither does the Court concede that the stockholders can stand by until the Conservator, with the approval of the Court, sells a part of the assets, and then challenge the wisdom of the sale in a suit to enforce the statutory liability."

And commenting in that case upon the defense that the Federal and state officials had wasted the assets, the Circuit Court of Appeals said on page 516:

> "The Congress probably did not foresee the cataclysmic conditions existing in and around Detroit in the early part of 1929, but we see no logic in, nor necessity for, abrogating the statute simply because the cir-

cumstances were unusual. On the other hand, it seems to us that the more unparalleled the situation, the greater the need for depositors' protection. If assets of the bank were being wasted by the alleged illegal action of state and federal officials it occurs to us that the directors of the holding company, instead of acquiescing, would have resorted to the courts to stop it."

In *Davis Trust Company* v. *Hardee,* 85 Fed. (2) 571 (App. D. C.) the stockholders of the Federal-American National Bank and Trust Company attempted to enjoin collection of the assessment on the grounds that the sale of assets by the Conservator was unfair to the stockholders and creditors because the sale did not take into consideration possible future enhancement in value of assets. The Court refused to consider this as a defense to payment of the assessment.

An analogous situation has arisen where a creditor of a failed national bank has filed a general claim against it and then, at some future time when the situation is entirely changed, attempts to promote such general claim to a preferred claim. In the case of *Poole* v. *Elliott,* 76 Fed. (2) 772, (C. C. A. 4) the Court said at page 775:

"In such cases, therefore, the establishment of a trust in favor of depositors on the ground of hopeless and irretrievable insolvency would affect a large part of the obligations to depositors and probably all of the cash assets passing into the hands of the receivers; and the court should not entertain a petition asking such relief unless petitioner has acted promptly on learning of the bank's insolvency and before matters have progressed to the point that relief cannot be afforded without injustice to other persons interested in the administration of the estate. Such a case is peculiarly one for the application of the maxim, "vigilantibus non dormientibus aequitas subvenit." What delay would constitute laches barring a depositor from the right to insist on such relief under different circumstances we need not here decide. Certainly he should not be permitted to amend his petition and ask such relief for the

first time after three years have elapsed and so much has been done towards the liquidation of the estate and the establishment of the rights of the parties interested therein."

See also:

Standard Oil Company v. *Elliott*, 80 Fed. (2d) 158 (C. C. A. 4).
City Bank v. *Blackmore*, 75 Fed. 771 (C. C. A. 6).

An analogous situation arises where, when sued to enforce the assessment the stockholder sets up fraud on the part of the bank's officers in inducing him to purchase his stock. The Courts have uniformly held that such a defense can not be asserted to collection of the assessment and that prompt action must be taken to rescind the transaction. See:

Delano v. *Butler*, 118 U. S. 634.
Lantry v. *Wallace*, 182 U. S. 536.
Scott v. *Deweese*, 181 U. S. 202.
Williams v. *Stone*, 25 Fed. (2d) 831 (C. C. A. 4).
B. V. Emery & Co. v. *Wilkinson*, 72 Fed. (2d) 10 (C. C. A. 10).
National Bank v. *Newbegin*, 74 Fed. 135 (C. C. A. 8).
Scott v. *Lattimer*, 89 Fed. 843 (C. C. A. 8).
Anderson v. *Cronkelton*, 32 Fed. (2d) 170 (C. C. A. 8).
Wilcox v. *Harriman Securities Corp.*, 10 Fed. Sup. 532.

The stockholders must be taken to have known of the proposed plan of reorganization, the sale of assets to the new bank, the re-allocation of the assets among the three banks and the appointment of a Conservator and Receivers for them. Since they did not act promptly to protect whatever rights they had, such objections come too late when they are asserted by the stockholders for the sole purpose of avoiding payment of the assessment, and years after the transactions complained of, when the circumstances are vastly different, and liquidation has progressed so far to establish and vest the rights of creditors in the insolvent estates.

V.

Speedy Action is Necessary in Collecting the Assessment in Order that the Rights of Creditors May Be Protected.

As has been stated, the gist of the bills of complaint is that if certain alleged claims of the Penn National and Reading National against the Farmers National, in the respective amounts of $5,100,000.00 and $9,000,000.00, are pursued, the enforcement of the assessment against the stockholders of these banks would be unnecessary. We take the position that the Comptroller has the right under the law to collect the full amount of the assessment immediately, and if, after liquidating the assets, causes of action and claims of the bank, it should appear that the assessment was unnecessary in whole or in part, then the law affords ample protection to the stockholders.

The National Bank Act (Section 197, Title 12 U. S. C.) (App. 46) provides in effect that when every creditor of a failed national bank shall have been paid in full, together with expenses of the receivership, a meeting of the stockholders will be called at which shall be determined whether the receivership shall be continued or whether an agent shall be elected to liquidate the interests of the stockholders. An elaborate system is provided for protecting the stockholders' interests and the return to them of any money that they may have paid on their stock assessment which may be found to be unnecessary for use in paying the debts of the bank, is by law amply secured. The Courts have repeatedly held that as between the stockholders and the creditors the convenience of the latter is preferred. Thus, in *Kennedy v. Gibson*, 8 Wall. 498 at pages 505-506, this Court said:

> "It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise, in the intervening time. The

amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases can not be foreseen. The same remarks apply to the enforced collections from the stockholders. *A speedy adjustment* is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. *It is better they should pay more than may prove to be needed than that the evils of delay should be encountered.*" (Italics ours.)

And again in *Studebaker* v. *Perry,* 184 U. S. 258, at page 262 this Court said:

"In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thrown upon the creditors.

"There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences."

And the decisions emphasize the fact that the stockholder must pay promptly when he is called upon, since the statutory liability was created for the protection of creditors and in order to strengthen banks in the confidence of the public.

See:

Richmond v. *Irons*, 121 U. S. 27.
Christopher v. *Norvell*, 201 U. S. 216.
Korbly v. *Springfield Inst. for Sav.*, 245 U. S. 330.
Liberty Bank v. *McIntosh*, 16 Fed. (2d) 906 (C. C. A. 4).
Crawford v. *Gamble*, 57 Fed. (2d) 15 (C. C. A. 6).
Sneeden v. *City of Marion*, 64 Fed. (2d) 721; 291 U. S. 262.
Heiden v. *Creimin*, 66 Fed. (2d) 943 (C. C. A. 8).
Broderick v. *American General Corp.*, 71 Fed. (2d) 864 (C. C. A. 4).
U. S. Savings Bank v. *Morgenthau*, 85 Fed. (2d) 811 (App. D. C.).

The United States Circuit Court of Appeals for the Third Circuit recognized the fact that positive and quick action was contemplated in winding up insolvent national banks and said in *Miller* v. *Stock, supra*:

> "We are admonished by the Supreme Court that it is the duty of Federal Courts to act promptly in aiding the Comptroller in enforcing the liability of shareholders, that Court saying in Kennedy v. Gibson et al., 8 Wall. 498, 505, 19 L. Ed. 476: 'A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it.' And in Korbly v. Springfield Inst. for Savings, 245 U. S. 333, 38 S. Ct. 88, 90, 62 L. Ed. 326, this language is virtually repeated, the statutory provisions being referred to, as intended 'to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions . . .' In pursuance thereof, we act with promptness in disposing of this case and no longer delaying the enforcement of the Comptroller's assessment made September 28 1931."

And the opinion of the Court below (R. 69) recognizes this principle. However, the practical effect of the decision of the Court below is to permit and encourage delay in the

liquidation of these banks merely because the stockholders disagree with the decisions of the Comptroller as to the necessity for the assessment and with the value which he assigned to the assets of the banks available to pay their debts. It is respectfully submitted that the decision of the Court below, if permitted to stand, sets up a precedent for all times that stockholders can question the finding and decisions of the Comptroller as to the existence of insolvency and the necessity for the assessment. If the decision stands, it will be necessary for the petitioner to proceed with the litigation in the District Court, to attempt to evaluate the assets by a lengthy process of accounting and thus attempt to ascertain what the alleged claims of the Penn National and Reading National against the Farmers National arising out of the attempted merger agreement are worth as compared with the assets which were allocated in their places. Such a precedent has never heretofore been sanctioned by this Court.

As stated above, nowhere is it shown that the stockholders were harmed or prejudiced by the course resorted to by the Comptroller in administering the assets of these banks. They should not be permitted to delay the liquidation of these banks and the early distribution of proceeds to depositors and creditors, but on the contrary should be required to respond immediately by paying the assessments.

CONCLUSION.

It is therefore submitted that the action of the [illegible] Court in reversing the orders of the United States District Court, and thus sustaining the right of the stockholders to enjoin the enforcement and collection of the assessment, was error

and the decision below should be reversed and the suits should be ordered dismissed with prejudice.

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for Comptroller of Currency,
Of Counsel.

APPENDIX.

Section 33. Consolidation of banks; capital stock; dissenting shareholders; notice; valuation of shares.

Any two or more national banking associations located within the same State, county, city, town, or village may, with the approval of the Comptroller of the Currency, consolidate into one association under the charter of either existing banks, on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association proposing to consolidate, and be ratified and confirmed by the affirmative vote of the shareholders of each such association owning at least two-thirds of its capital stock outstanding, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper published in the place where the said association is located, and if no newspaper is published in the place, then in a paper published nearest thereto, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting: *Provided*, That the capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: *And provided further*, That if such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of each of the associations proposing to consolidate, any shareholder of any of the associations so consolidated, who has voted against such consolidation at the meeting of the association of which he is a shareholder or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to the shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said

reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of the reappraisal; otherwise the appellant shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due and be forthwith paid to said shareholder from said bank, and the share so paid shall be surrendered and after due notice sold at public auction within thirty days after the final appraisement provided for in this section.

Publication of notice and notification by registered mail of the meeting provided for in the foregoing paragraph may be waived by unanimous action of the shareholders of the respective associations. Where a dissenting shareholder has given notice as above provided to the association of which he is a shareholder of his dissent from the plan of consolidation, and the directors thereof fail for more than thirty days thereafter to appoint an appraiser of the value of his shares, said shareholder may request the Comptroller of the Currency to appoint such appraiser to act on the appraisal committee for and on behalf of such association.

If shares, when sold at public auction in accordance with this section, realize a price greater than their final appraised value, the excess in such sale price shall be paid to the shareholder. The consolidated association shall be liable for all liabilities of the respective consolidating association. In the event one of the appraisers fails to agree with the others as to the value of said shares, then the valuation of the remaining appraisers shall govern. (Nov. 7, 1918, c. 209, Sec. 1, 40 Stat. 1043; June 16, 1933, c. 89, Sec. 24 (a), 48 Stat. 190; Aug. 23, 1935, c. 614, Sec. 330, 49 Stat. 718.)

Section 197. Shareholders' meeting; continuance of receivership; appointment of agent; winding up business; distribution of assets.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section 192 and other section of this Code, and when, as provided in section 194 thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the

redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order

and control of said comptroller and said receiver, or either of them; and for this purpose said comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said comptroller and the said receiver shall by virtue of this chapter be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record,

and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said comptroller or said agent. (June 30, 1876, c. 156, Sec. 3, 19 Stat. 63; Aug. 3, 1892, c. 360, 27 Stat. 345; Mar. 2, 1897, c. 354, 29 Stat. 600.)